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No. 03-1588

IN THE

Supreme Court of the United States

MINKA LIGHTING, INC.,

Petitioner,

v.

CRAFTMADE INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Respondent's brief in opposition to the petition for certiorari is based on two faulty premises. First, the lower courts properly could ignore Petitioner Minka's survey evidence because it allegedly was flawed. Second, even competent survey evidence reflecting the collective viewpoint of ordinary purchasers is not sufficiently probative in design patent cases to avoid summary judgment. As demonstrated below, each of the premises is incorrect.

I.

RESPONDENT'S BELATED ARGUMENT THAT MINKA'S SURVEY EVIDENCE IS INCOMPETENT WAS NOT A BASIS FOR EITHER DECISION BELOW

The Federal Circuit held that a trial court is free to disregard *competent* empirical evidence that ordinary purchasers consider the accused and patented designs to be substantially the same, the infringement standard articulated in *Gorham v. White*, 81 U.S. (14 Wall) 511, 528 (1871).[1] Respondent seeks to misdirect attention from this actual holding by concocting a laundry list of *alleged* deficiencies in Minka's statistical survey evidence.[2]

Neither lower court discussed those alleged deficiencies, let alone used them as the basis for either of the opinions. Respondent did not raise a *Daubert* challenge, and first questioned the competence of Minka's survey in its summary judgment reply brief, leaving Minka no opportunity to

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1. *See* Petition for Cert., at 15.

2. *See* Respondent's Opposition, at 8-11.

respond.[3] Not surprisingly under such circumstances, the district court treated Minka's survey evidence as admissible, but determined it could nevertheless rely on its own visual comparison to find non-infringement. [*Minka I*, App. C, at 22a]. The Federal Circuit likewise did not base its decision on any finding that Minka's survey was incompetent or flawed. Rather, the appellate court found no abuse of discretion because "a district court may admit ordinary observer witness testimony to determine substantial similarity, but *is not required to do so*." [*Minka II*, App. A, at 8a] (emphasis added).

Respondent's belated and unfair attack on Minka's statistical survey evidence is a red herring in view of what the courts below actually considered and held. Accordingly, the Court should not deny the petition on this basis.

II.

COMPETENT SURVEY EVIDENCE ALWAYS IS PROBATIVE OF WHETHER DESIGNS ARE "SUBSTANTIALLY THE SAME" IN DESIGN PATENT DISPUTES

Respondent also argues that the Court should deny Minka's petition because competent survey evidence showing substantial consumer confusion is not sufficiently probative to raise a triable fact issue of design patent infringement. Here, Respondent (as did the trial court) *inter alia* relies on a Second Circuit decision involving copyright law.[4] Not only

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3. *Compare* CTAF A366-396 *with* CTAF A489-505.

4. *See* Respondent's Opposition, at 14 (citing *Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231 (2d Cir. 1983)).

did the Federal Circuit decline to use this decision as a basis for its ruling, but this Court has never held, or even suggested, that courts can simply disregard at will competent survey evidence regarding "substantial similarity" or "sameness of design."

Competent survey evidence always is relevant in design patent cases to shed light on whether "ordinary purchasers" would regard the patented and accused designs to be "substantially the same." *Gorham*, 81 U.S. at 528, 530-31. This follows because "ordinary purchasers" are a hypothetical subset with unique viewpoints or knowledge not possessed by the general population. Survey evidence informs the trier-of-fact whether hypothetical ordinary purchasers would consider the designs to be substantially the same. *See generally* Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 425-31 (1960) (approving surveys).

In *Gorham*, this Court accepted empirical evidence demonstrating two designs were substantially the same. 81 U.S. at 528. Isolated criticism by an inferior court in the different context of copyright law does not constitute repeal of the rule announced in *Gorham*.

CONCLUSION

Petitioner therefore respectfully requests that the Court grant its Petition for A Writ of Certiorari and reverse the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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